

EXHIBIT B

O94RTHOc

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 MARTINE THOMAS, *as Parent and*
4 *Natural Guardian of A.T., et*
al.,

5 Plaintiffs,

6 v.

24 Civ. 05138 (JLR)

7 DAVID C. BANKS, *in his*
8 *official capacity as*
9 *Chancellor of the New York*
City Department of Education,
et al.,

OCS Hearing

10 Defendants.

11 -----x

12 New York, N.Y.
13 September 4, 2024
3:00 p.m.

14 Before:

15 HON. JENNIFER L. ROCHON,

16 District Judge

17 APPEARANCES

18 BRAIN INJURY RIGHTS GROUP
Attorneys for Plaintiffs
19 BY: RORY J. BELLANTONI

20 NEW YORK CITY LAW DEPARTMENT
Attorneys for Defendants
21 BY: THOMAS LINDEMAN

22 Also Present:
23 Alexandra Martinesi, Paralegal, Brain Injury Rights Group
24
25

O94RTHOc

(Case called)

MR. BELLANTONI: Good afternoon, your Honor. Rory Bellantoni for the plaintiffs. Your Honor, I have with me Alexandra Martinesi. She's not an attorney. She's a paralegal. My associate was sick and couldn't make it. So she's here to help me if that's okay with your Honor?

THE COURT: Absolutely. Welcome to you both.

MR. LINDEMAN: Good afternoon, your Honor. Thomas Lindeman for defendants.

THE COURT: Hello, Mr. Lindeman. I understand your colleague might be joining.

MR. LINDEMAN: I think he is having transportation troubles, so he might not make it.

THE COURT: He might not make it.

MR. LINDEMAN: I suppose if we go long enough, your Honor.

THE COURT: Well, I won't base it on that.

So we are here on an order to show cause that was filed by plaintiff for emergency relief. There was a portion that was filed earlier for emergency relief with respect to the meetings, scheduled resolution meetings, and I denied that earlier. But now we've got another portion of an order to show cause regarding the complaint filed in this action, and that letter motion was filed, I believe, on August 20. It is seeking why an injunction should not be issued identifying the

094RTHOc

1 plaintiffs' pendency programs, placements, and requiring
2 defendant to fund said programs and placements inclusive of
3 tuition-related services, special transportation, and nursing
4 or applicable, and directing the DOE to fund each student
5 plaintiffs' tuition and related services to the extent that
6 each parent plaintiff is obligated.

7 I did receive plaintiffs' memorandum of law in support
8 of their motion and declaration as well as exhibits. I did get
9 defendants' opposition to that motion on August 29, and then I
10 got a reply from plaintiffs on September 4, today. I have with
11 that another declaration and associated exhibits.

12 So why don't we start then with you Mr. Bellantoni
13 since it is your motion. I don't know if there are any
14 updates; probably not since I got your reply as late as today,
15 so that should be as current as it comes. But I'm happy to
16 hear any other argument or any other presentation you wish to
17 make with respect to your request for injunctive relief.

18 MR. BELLANTONI: Thank you, your Honor. Just to be
19 clear—and I'm not sure this was last night—I learned this
20 morning that there are three students that have pendency.
21 Well, for the record—we could always scrub it later—but A --

22 THE COURT: Just give me the initials.

23 MR. BELLANTONI: A.C. or A.C.T., M.B., and S.J.D.

24 THE COURT: So M.B., as in boy?

25 MR. BELLANTONI: Yes, your Honor.

O94RTHOc

1 THE COURT: So they have pendency orders?

2 MR. BELLANTONI: They have pendency orders now.

3 THE COURT: Okay.

4 MR. BELLANTONI: The DOE has made a tuition payment
5 with respect to S.J.D.

6 THE COURT: Okay.

7 MR. BELLANTONI: The other three students: A.T., L.C.
8 and M.C., while pendency does lie at iBRAIN, based on an
9 unappealed or final administrative order, they don't have a
10 pendency order. None of the students have pendency orders yet,
11 and the DOE has contested pendency in the proceedings below.

12 I know there's some discussion in the DOE's opposition
13 brief that plaintiffs aren't entitled to an order because
14 pendency shouldn't require one. It's automatic. Therein lies
15 the problem, your Honor. We filed ten-day notices mid June,
16 due process complaints the beginning of July. The DOE has not
17 only not conceded pendency as in years past, but this year
18 actively has opposed pendency at iBRAIN.

19 In addition --

20 THE COURT: Let me pause you for a moment.

21 MR. BELLANTONI: Yes, your Honor.

22 THE COURT: So we have three of the plaintiffs. And
23 how many plaintiffs do we have here? We have six plaintiffs.
24 So three of them have pendency orders, and so now you are
25 arguing about the other three who have pendency with iBRAIN but

O94RTHOc

1 not a pendency order?

2 MR. BELLANTONI: Neither an order nor a concession
3 from the defendants, which last year arguably was what mooted
4 out many of the cases we filed. By mid August or September,
5 the DOE conceded that pendency lied at iBRAIN and they would
6 fund pendency, which was the issue in *Mendez*.

7 THE COURT: Okay.

8 MR. BELLANTONI: Different this year, DOE has not
9 conceded that pendency lies in iBRAIN and that they will fund
10 pendency. They've objected to the educational program.
11 They've objected to transportation. They've offered to provide
12 transportation through the school system. None of the IHOs
13 here ordered that as part of pendency. It was ordered in
14 another case for two of the students; although, it hasn't been
15 provided yet. So this isn't a situation, unfortunately as in
16 years past, where ultimately we can agree where pendency lies.
17 Even though it's automatic, at this point, the DOE has
18 contested --

19 THE COURT: And how have they contested if it's
20 automatic?

21 MR. BELLANTONI: Well, at the administrative
22 proceedings, they've actively submitted motions opposing
23 pendency with respect to the school. I think one of the
24 arguments is that the tuition has gone up, and they don't
25 concede that iBRAIN is the appropriate placement but that if it

O94RTHOc

1 were, the tuition is too costly. Which begs the question,
2 Judge --

3 THE COURT: Go on.

4 MR. BELLANTONI: I was going to say, your Honor—I
5 don't want to do the defense's job for them—but if it were my
6 client, I would advise them to then at least begin to fund what
7 they think they owe and we can fight about the difference. The
8 problem here is that they are contesting pendency because
9 there's a difference in the tuition amount between last year
10 and this year. As far as --

11 THE COURT: Okay. When you say they filed papers in
12 the administrative proceeding, so that administrative
13 proceeding is progressing with respect to those three?

14 MR. BELLANTONI: Yes, your Honor. I can -- for L.C.,
15 there's a hearing schedule for tomorrow on the final merits.
16 So student still hasn't gotten a pendency order or
17 determination.

18 THE COURT: Okay.

19 MR. BELLANTONI: For M.C., there's a hearing scheduled
20 for today. I don't know that it's done. I haven't gotten a
21 word, but it's a pendency hearing and a due process hearing.

22 THE COURT: Okay.

23 MR. BELLANTONI: And for...

24 THE COURT: A.T.

25 MR. BELLANTONI: If I could just go through my notes

O94RTHOc

1 briefly, your Honor?

2 THE COURT: Sure.

3 MR. BELLANTONI: There was a pendency hearing that
4 occurred on the 21st and 23rd of August. Pendency disclosures
5 were filed on August 21. No pendency order has issued yet, and
6 I don't have a date for that hearing, for the final
7 administrative hearing on the merits.

8 THE COURT: Okay. That gives me a good lay of the
9 land.

10 All right. And so, with respect to the three who have
11 pendency orders, why is that not moot in terms of the
12 injunctive relief you are seeking with respect to them other
13 than the payments that you're seeking?

14 MR. BELLANTONI: For those three, it may very well be,
15 your Honor --

16 THE COURT: Okay.

17 MR. BELLANTONI: -- at least at this point. If
18 there's an acknowledgment from counsel today that DOE agrees
19 pendency lies there; they are not appealing the orders. They
20 do have, I guess it's 45 days to appeal, 25 days to file a
21 notice of intent to seek review to the SRO. So if the DOE
22 isn't appealing those and they concede that pendency lies at
23 iBRAIN, they have an obligation to fund, and in the underlying
24 proceedings, they want them to provide their own
25 transportation. If they are now conceding that they have to

O94RTHOc

1 fund the private transportation, then those issues would be
2 moot, your Honor.

3 THE COURT: So I guess a fundamental question that I
4 have, Mr. Bellantoni, is—let's focus on the latter three, the
5 three that are going through the administrative proceedings
6 right now—why is that ripe for my review when we haven't even
7 gotten through the administrative proceedings yet?

8 MR. BELLANTONI: Well, this was discussed with Judge
9 Schofield yesterday. I know Mr. Lindeman will address it, so
10 I'm not going to get ahead of him. Judge Schofield took the
11 position that at this point, she wasn't acknowledging that she
12 had jurisdiction. She wants to see a 12(b)(1) motion on the
13 facts to determine if she has jurisdiction. I indicated I
14 would amend the complaint to include more recent facts. So I
15 have until next week to amend the complaint.

16 She didn't get to the TRO because she was not
17 confident she had jurisdiction over the matter. As far as
18 whether it's ripe or not, the idea that administrative remedies
19 are not exhausted doesn't apply here in cases related to
20 pendency. I mean, the Second Circuit addresses this in a case
21 we lost in *Ventura de Paulino*. I wasn't at the firm at the
22 time, but there was relief sought. We didn't prevail, but the
23 Second Circuit said at least for jurisdictional purposes or
24 exhaustive purposes, any case that implicates pendency, there's
25 no need to exhaust administrative remedies.

094RTHOc

1 So here if we're saying it's not ripe because we
2 haven't exhausted, we don't have to exhaust. If there's a
3 different issue where it's not ripe because there may not be a
4 discernible controversy because the DOE hasn't yet said we're
5 not paying. Again, unlike the facts of *Mendez*, which I was
6 part of below and in the Second Circuit, there the DOE conceded
7 pendency lied at iBRAIN, said they were processing payment,
8 said payment would be made. Therefore, the implication in the
9 complaint that no it wouldn't despite statements it would be,
10 it wasn't right.

11 Also, that complaint was not pled properly. I believe
12 we asked for tuition to be paid to the end of the school year
13 rather than throughout the entirety of the administrative
14 proceedings. And one of the things Judge Nathan said, You
15 can't ask for relief to the end of the school year because
16 we're not at the end of the year yet. So if you are asking
17 about current pendency, funding as the student is staying put,
18 if you will, that's ripe. But the idea that we want payment
19 from now until the end of the school year isn't ripe because
20 she found that there was nothing in the papers that suggested
21 that the DOE wasn't going fund pendency through the end of the
22 school year.

23 Here, while the issue of funding, I would argue again
24 that the letter the school got about being behind in rent and
25 the landlord threatening to start an eviction process, with

O94RTHOc

1 respect to some of the iBRAIN offices, puts the students at
2 risk, or at least it did when I filed the motion.

3 If I may, Judge, one of the complications here for me
4 as an attorney is that this school will not disenroll
5 individual students that get behind in tuition. So if I had a
6 letter from the school that said if tuition isn't paid by
7 Monday, your child is out, well, there's the irreparable harm.
8 But this school will not do that. So what happens is when the
9 school gets behind in rent and cannot make payroll and is
10 facing actual closure payment and I start an action like this,
11 payment for one student may obviate the need for orders for all
12 the rest.

13 If they are behind \$2- or \$300,000 in rent and
14 pendency from July to December last year was like \$4- or \$5
15 million that hadn't been paid, \$3-, \$4-, \$500,000 certainly
16 takes them out of that imminent risk category. Now, the
17 school, if they were here, I am sure they would tell you, No,
18 no, they are in danger of closing. I can't say that, but they
19 are not a foreclosure action if at least they are current and
20 more payments are coming.

21 THE COURT: In fact, S.J.D. was just given tuition
22 payment.

23 MR. BELLANTONI: Exactly. So that would go towards
24 the back rent. So the issue, Judge, with respect to ripeness
25 is the 10-day notices in June advised the DOE that students

O94RTHOc

1 would be staying at iBRAIN. Remember, your Honor—and I
2 apologize for using "remember," your Honor—in order to have
3 pendency at iBRAIN, the students would have to have prevailed
4 last year. So iBRAIN becomes their current educational
5 placement. The DOE was put on notice, at least in mid June,
6 that the students would be staying here, again in July that the
7 students would be staying here, objected to pendency, moved to
8 dismiss some of the cases because the parents didn't attend the
9 resolution meetings. Although, we're beyond the resolution
10 process, so I'm not going to discuss that, but there have been
11 objections below.

12 One of the issues that *Mendez* created is that the DOE
13 is given at least some latitude to pay pendency in its due
14 course. But they don't -- won't discuss with us what their due
15 course is. Some students have gotten pendency payments while
16 others they haven't conceded have pendency at iBRAIN. If they
17 at least conceded iBRAIN was the pendency placement, then I
18 couldn't bring an action until there was some harm or at least
19 prospective harm to the students. So it's ripe, right now,
20 your Honor if not the funding portion, at least the
21 determination.

22 As far as I can observe until there's a concession or
23 order establishing pendency, the DOE won't even start its due
24 course. So if we don't have an order or concession now, there
25 may not be pendency payments until February or March. And I'm

O94RTHOc

1 not saying that that is intentional. I mean, I might another
2 day, but even if it's just, as Mr. Lindeman will advise the
3 Court, the DOE has thousands of students to deal with and
4 process and these cases fall off their radar if there isn't an
5 order, then these students can be harmed down the road when
6 there isn't an ability to fund the school. The school has --

7 Your Honor, I'm not sure if Mr. Mielnik made it clear
8 in his declaration, but there are 200 employees in this school,
9 two campuses in the city, one on the Upper East Side and one in
10 Brooklyn. The payroll alone, I think, is \$600,000 every two
11 weeks for 200 employees. So I understand it's not the DOE's
12 job to fund the private school unless it is, and for these 40
13 students—well, the six here and others that have pendency—it
14 is their obligation to continue funding these placements from
15 last year into this year.

16 These students, your Honor, started school in July.
17 They are on an extended school year program. In fact, one of
18 the issues we went into is the DOE doesn't have witnesses to
19 appear at the hearings over the summer. I know there are a lot
20 of students the DOE deals with. I don't know that there are
21 20- or 30,000 in this category. I know of two schools, iHOPE
22 and iBRAIN, that deal with students that have traumatic brain
23 injury.

24 Again, we've never had that conversation where the DOE
25 would sit down and say, Listen, we processed 10,000, 5,000,

O94RTHOc

1 4,000, 300 requests every year. Here is how you can make it
2 easier for us. We've tried that. We forwarded the
3 administrative orders that formed the basis of pendency, but no
4 luck. I think you are looking at the exhibit to my
5 declaration, in the administrative proceedings, the DOE moves
6 to dismiss the matters before the IHOs or at least opposes
7 pendency, arguing that because we started this action, the
8 administrative officers don't have jurisdiction. And then,
9 they come here and argue, your Honor doesn't have jurisdiction
10 because we started the action in the administrative proceeding.
11 Yet no -- even as they say in their brief pendency automatic,
12 no concession that pendency lies at iBRAIN.

13 THE COURT: Thank you, Mr. Bellantoni. Let me ask a
14 couple of questions. So the first one is on irreparable harm.
15 I know there's a dispute about whether you're saying you don't
16 have to do irreparable harm, and you have to meet the *Mendez*
17 standard that the placement is at risk or whatever the rule is.
18 You are essentially here for expedited injunctive relief out of
19 the normal course, and that is usually only given if there is
20 some impending irreparable harm.

21 What is that? Because otherwise I have a motion to
22 dismiss that would address jurisdictional issues that I think
23 are probably important to address, and your clients are at
24 iBRAIN. They are getting services. They haven't been denied
25 services. Payments are coming in. They are not all in but

O94RTHOc

1 under *Mendez*, I can't order them to come in faster. So what is
2 the irreparable harm that warrants an order of this Court now,
3 as opposed to briefing of the motion to dismiss, briefing of
4 the injunction request, the subject matter jurisdiction, et
5 cetera, in the normal course?

6 MR. BELLANTONI: If I may just briefly, your Honor, in
7 *Mendez*, Judge Nathan recognized two of the three principles
8 that we argued, and that is pendency under 1514(j) is automatic
9 as to placement. We don't have to show the four factors, and
10 automatic as to the responsibility to fund. She never said
11 that the harm that has to be demonstrated is irreparable.

12 In fact, if you read her decision to the end, there's
13 a final section where she addresses notwithstanding the above,
14 let's talk about irreparable harm. What she said was under
15 1415(j) the automatic injunction becomes automatic potentially
16 if you can show that the placement is in jeopardy or is at risk
17 of losing the program. Now, I would argue it's synonymous. In
18 *Honig*, the Supreme Court said that denial of services, harm is
19 presumed under 1415(j). If you don't have a pendency
20 placement, harm is presumed. So there's one argument, your
21 Honor, analogous to First Amendment cases. If I'm deprived of
22 my right to speak tomorrow, while I may not have a catastrophic
23 injury, the denial of that right is irreparable.

24 THE COURT: What is the right they are being denied?

25 MR. BELLANTONI: One of the rights they are being

O94RTHOc

1 denied is part of the free appropriate public education.

2 THE COURT: But they are in iBRAIN?

3 MR. BELLANTONI: Yes, but the DOE makes this argument
4 that they are getting the services they are required to get but
5 only because the school goes into debt every pay period. In
6 other words, they are not funding those services. They are
7 getting them until they won't, and once they are out on that
8 sidewalk, once staff quits because they don't get paid and this
9 has happened. Payment was delayed last year. It was a week,
10 two weeks. Once you lose personnel in the school, people are
11 not going to come and work at a place they think isn't solid.
12 So the harm right now, and more specifically in this case, was
13 the letter from the landlord that the school is behind in rent
14 and subject to eviction proceedings if they don't get their
15 rent money by the 28th.

16 I understand that Mr. Mielnik advised the landlord
17 they are in court and there could potentially be a remedy, so
18 they haven't started the eviction proceedings yet. You take
19 the payment that was made for S.J.D., if rent was due or
20 outstanding three weeks ago in the amount of \$150,000, it looks
21 like that payment is going to cover that. But then you still
22 have \$600,000 in payroll to cover for the past two weeks. I
23 think Judge Failla, last year, asked about mismanagement. How
24 do we know the school isn't mismanaging money rather than -- my
25 answer was, They are owed what they are owed. Until they get

094RTHOc

1 what they are owed, I don't think we get that far.

2 I think if anything may not be ripe right now, it may
3 be the request for expedited funding. But as far as a pendency
4 order, given that the DOE has contested pendency below, I think
5 the issue -- and it may not necessarily require relief in the
6 form of the TRO today. Expedited next week, maybe a week
7 later, but we're talking about a school that walks a very fine
8 line between trying to stay open and closed. And we don't get
9 any of the, you know, discussion of what we're doing.

10 You know, the DOE complains that these students get
11 lawyers and want to jump to the top of the pile of all the
12 students. But if that's improper, maybe just tell me where I
13 am in the pile. We don't know whether these students are three
14 months from getting pendency, they are 5,000 on the list,
15 whether they are third. Is there anything we can do to
16 expedite their review of pendency? We provided the orders. We
17 provided the final orders and -- not a convincing argument in
18 some courtrooms, but pendency for these kids, your Honor, is
19 established as soon as an underlying administrative order
20 becomes final. It doesn't have to be July 5th.

21 For an example, I don't have the complaint, but
22 hypothetically if S.J.D.'s final administrative order was
23 issued last January, they knew last January that if the parent
24 contests the IEP this year, pendency is at iBRAIN. It's not
25 like we filed the DPC, ran to court and didn't give the DOE

094RTHOc

1 time to determine where pendency lied. They had seven months.
2 They knew if S.J.D. contests their IEP, it's going to be at a
3 Brian.

4 THE COURT: Thank you, Mr. Bellantoni. Let me hear
5 from your colleague, and then maybe we'll come back to you. I
6 just need a little bit of balance there.

7 MR. BELLANTONI: I'm sorry. Thank you, Judge.

8 THE COURT: Oh, no, and thank you for being such a
9 strong advocate for clients.

10 Mr. Lindeman, you can add to what is in your paper.
11 You can feel free to address anything you wish. What I'm
12 struggling with right now is why we're here for expedited
13 relief, and why I shouldn't just be proceeding down to the
14 motion to dismiss route to see if there's jurisdiction at all
15 and then move from there. But why don't you address the points
16 made by Mr. Bellantoni, if you could?

17 MR. LINDEMAN: All of them, your Honor?

18 THE COURT: Well, I guess one of them that I would
19 like you to address would be the individuals A.T., L.C. and
20 M.C. do not have pendency orders. And so, is there some relief
21 that it is appropriate for this Court to grant at this point?

22 MR. LINDEMAN: Your Honor, I don't believe that there
23 is. To, I think, add some color to what plaintiffs' counsel
24 said, I don't actually believe that for most of these students
25 the specific placement at iBRAIN is being contested. My

O94RTHOc

1 understanding is that most of what is being contested at the
2 administrative level is the cost of these services, what
3 services are covered by pendency, whether that means nursing
4 services, additional or related services and who provides
5 transportation services.

6 THE COURT: So let me pause you for a moment. So what
7 is being contested is the cost of iBRAIN or just the additional
8 services?

9 MR. LINDEMAN: I want to say both.

10 THE COURT: Okay.

11 MR. LINDEMAN: The way that iBRAIN structures, as I
12 understand it -- my office doesn't handle the administrative
13 portions of these cases, so these come to me a little later in
14 the process. But as I understand it, having seen iBRAIN
15 tuition payments in the past, they have a base tuition, which
16 is in-class services for the year, and then separately there
17 are costs for related services which can be occupational
18 therapy and --

19 THE COURT: Nursing, transportation?

20 MR. LINDEMAN: Nursing is handled by a separate
21 company—I apologize, your Honor—and transportation is handled
22 by yet another company.

23 THE COURT: Okay.

24 MR. LINDEMAN: But iBRAIN structures its portion of
25 those services as base level tuition and then additional

O94RTHOc

1 related services that this student might need. My
2 understanding is that year to year the cost of those services
3 change. Our argument has been that when the cost of those
4 services change or when the student is receiving services in
5 the current year that they did not receive in the previous
6 year, the DOE should only be obligated to pay for the cost of
7 services that they were ordered to pay for the previous year.
8 Whether an IHO agrees with that, that is up to the discretion
9 of an IHO. It's probably related to how much those things
10 cost, whether the placement is based on additional metrics,
11 other things that could be briefed at the administrative level.

12 My understanding is for the students that do have
13 pendency orders, the DOE does not intend to appeal those.

14 THE COURT: Who has pendency orders?

15 MR. LINDEMAN: S.J.D., M.B., and A.C.

16 THE COURT: Okay.

17 MR. LINDEMAN: I believe that the DOE does not intend
18 to appeal any of those orders, and I will assume that we'll
19 abide by any decisions that are made for the outstanding
20 students at the admin level. When those decisions are made, if
21 those decisions are adverse to the plaintiffs and there's some
22 risk then that an adverse decision would result in the student
23 losing placement, that decision might be ripe for this Court to
24 review. That's what Judge Clarke decided last year in the
25 *Gullon* case.

O94RTHOc

1 THE COURT: Or the Judge Englemayer case in --

2 MR. LINDEMAN: *Moonsammy*.

3 THE COURT: Yes.

4 MR. LINDEMAN: Each case is a little bit complicated.
5 They are actually, as I understand it as of earlier this week,
6 four outstanding cases dealing with that student. A lot went
7 on there, but that student did not previously have a pendency
8 determination. Plaintiffs are contesting a portion of an SRO
9 decision that grants pendency, and the parties had a
10 disagreement on whether the uncontested portion of the SRO case
11 created pendency or not, which is what Judge Englemayer was
12 asked to decide in the second of the four related cases.

13 THE COURT: Okay.

14 MR. LINDEMAN: But, yes --

15 THE COURT: When I read the *Moonsammy* cases, those
16 seem to be a different procedural posture than what we have
17 here.

18 MR. LINDEMAN: Yes, your Honor.

19 THE COURT: Let's go back to the procedural posture we
20 have here. And just to oversimplify for myself, we've got
21 three of the plaintiffs A.C., M.B. and S.J.D. who have pendency
22 orders. The DOE is not going to appeal those. I can't imagine
23 what relief that I need to give with respect to that. That
24 seems moot.

25 Now, there's three others, A.T., L.C. and M.C. who are

094RTHOc

1 in the middle of their hearings. It appears they are happening
2 today, have happened in the last few days, but they don't have
3 a pendency order. Why should I not consider relief from them
4 as requested from Mr. Bellantoni?

5 MR. LINDEMAN: Well, your Honor, it seems to me that
6 currently those students don't have a justiciable issue for
7 this Court to hear. They are receiving relief through the
8 administrative proceedings. They will receive a pendency
9 determination, and some of them will presumably receive final
10 determinations in the next two weeks. My understanding is for
11 all of these students, the compliance period runs out on the
12 15th or the 16th of this month. Some of the parties may,
13 of course, consent to extend that. I don't know the exact
14 posture of all these cases, but they are receiving the relief
15 they want.

16 Until an adverse decision is reached for one of these
17 students, there's nothing to contest. I would disagree with
18 Mr. Bellantoni's framing of the *Ventura de Paulino* case and the
19 *Mendez* case on these points. Both of those cases were also at
20 very different procedural postures. But what the Court said in
21 those moments were that if plaintiffs can show a harm, an
22 actual harm, a risk that the student is being taken out of
23 their pendency placement or a risk that the pendency -- or an
24 actual incidence where the student has been moved or is going
25 to be moved because the parties disagree on what pendency is,

094RTHOc

1 that is a live dispute. But there is no live dispute here
2 because the students are receiving their pendency placement
3 they are looking for, and they will receive an order in the
4 ordinary course of the administrative proceeding.

5 THE COURT: And that is what you briefed in point two
6 of your motion to dismiss?

7 MR. LINDEMAN: Yes, your Honor.

8 THE COURT: Which I don't have full briefing on, but
9 we're here preemptively because of the order to show cause.

10 MR. LINDEMAN: Yes. As I think Mr. Bellantoni
11 mentioned briefly, the parties appeared yesterday in front of
12 Judge Schofield and we discussed similar issues. We're going
13 to fully brief that case, I think, by the end of October. And
14 I think fully briefing those issues before discussing whether
15 there's actual substantive relief to be offered to plaintiffs
16 is more important than skipping the jurisdictional issues.

17 THE COURT: Right, which I, frankly, should not do
18 because I shouldn't be considering or granting or even
19 considering any relief if I don't have jurisdiction.

20 Okay. Let's move a little bit into the -- and I'll
21 call it irreparable harm or the risk to their placement or
22 however we choose to characterize it. What is the DOE's
23 position on that? I know I'm hearing different things from
24 plaintiff sort of day by day, but can I hear your position,
25 please?

094RTHOc

1 MR. LINDEMAN: There's sort of a complicated backstory
2 to some of this, your Honor, that I don't necessarily know. It
3 can be hard to get into because plaintiffs' counsel represents
4 a lot of these students but all at this one school, all
5 receiving services from the same third-party service providers.
6 And it's not entirely clear to me in this instance what the
7 harm would be to the students.

8 Roughly a year ago now, I received personally an email
9 containing a letter from a CPA who purported to work for iBRAIN
10 and some others. I never heard from him again but that letter
11 claimed that we owed them an outstanding \$3 or \$4 million
12 dollars. The math was wrong. We had some concerns about that.
13 About a month later, Mr. Arthur Mielnik wrote in a declaration
14 to several judges in that district that that number had
15 ballooned to \$7 million. That was over Thanksgiving of 2023.

16 By Christmas of 2023, most of those amounts had been
17 paid in the ordinary case. The harm had disappeared, and we
18 appeared in front of Judge Failla and addressed this issue,
19 what harm exists to the students if the school does shut down.
20 And the position that the court took in that matter, and which
21 I would repeat here, is that if these students are taken out of
22 their placement because the school shuts down, that is not
23 necessarily the obligation -- it's not necessarily the
24 obligation of the DOE to prevent that. There are a lot of
25 things that can go wrong at a school, and if we pay the

094RTHOc

1 taxpayers' money into a school and then it shuts down anyway,
2 that money doesn't come back. The obligation to the taxpayers
3 has to be considered in that instance.

4 Here we need --

5 THE COURT: I'm not sure we need to get there.

6 MR. LINDEMAN: It's a big question. I only bring it
7 up because here I'm not even sure that the risk that has been
8 raised is even equivalent to that one. Supposedly, these
9 payments are going into the school. Plaintiffs have informed
10 us that S.J.D. has received a payment. In their complaint, I
11 think they requested an order requiring payment within 90 days.
12 If 90 days is the standard we're looking for, this case hasn't
13 been live on the docket for 90 days. Most of these pendency
14 decisions have been issued within the last 30 days. The
15 compliance period is now only 32 or 33 days old. I don't know
16 that plaintiffs intend to stand on 90 days.

17 Honestly, I don't know what an appropriate timeline
18 looks like for IU, the implementation unit, to fully review a
19 series of payment documents, checking for errors if there are
20 errors, to get back to the parties who submitted them, receive
21 those documents, review them, approve them and mailing a check.
22 That is going to be case by case, which is part of the problem.
23 Here payments are happening. The school doesn't appear to be
24 in any danger. The students certainly aren't. I don't know
25 that there is a harm here, much less an irreparable harm.

O94RTHOc

1 THE COURT: Anything else you would like to add to
2 what has been presented by Mr. Bellantoni or to your papers?

3 MR. LINDEMAN: I don't believe so, your Honor.

4 THE COURT: All right. I may come back to you. Let
5 me see.

6 Mr. Bellantoni, let's talk about appropriate next
7 steps here.

8 MR. BELLANTONI: May I just, your Honor, just briefly?

9 THE COURT: Sure.

10 MR. BELLANTONI: In *Gruillon*, this is, I guess, at West
11 Law's fifth, star five, Judge Clarke writes: As in *Mendez*,
12 plaintiffs' claims here unripe unless and until DOE violates
13 its legal obligation. For the Court to conclude that DOE has
14 violated the statement provision, DOE would first have to
15 dispute or deny the students' pendency determinations, which it
16 has yet to do with respect to C.B. in that case.

17 Here they are disputing. They have disputed these
18 three students' right to pendency below. While Mr. Lindeman
19 may say it's the extra cost they are contesting, they are not
20 funding anything based on that difference. The other problem,
21 Mr. Lindeman will advise the Court that, you know, the final
22 hearings are coming up in the next couple of weeks, so there's
23 no harm here.

24 THE COURT: You said the hearing is scheduled today.

25 MR. BELLANTONI: One is today, yes, Judge.

O94RTHOc

1 THE COURT: One is tomorrow and one happened on
2 August 21 or 23.

3 MR. BELLANTONI: Yes. But as Judge Schofield
4 recognized in one of her *Araujo* opinions—and I think it's the
5 Second Circuit in *Mackey*—pendency is evaluated differently
6 than placement. Pendency is paid without respect to the merits
7 of the case. What the DOE does and has done is they are not
8 funding pendency. And then when the parent loses in November
9 or December say, they don't say, Okay. We lost. We're still
10 going to give you the pendency money from July and November
11 that we should have paid all along. We don't owe you anything,
12 Judge. They come in and tell the court that that FOFD changes
13 the pendency placement, but it doesn't. There's still an
14 obligation to fund under pendency even if there's no
15 reimbursement under the administrative hearing order.

16 THE COURT: I hear you Mr. Bellantoni, but again,
17 that's a funding request made to me to expedite funding, which
18 I have constraints upon me based on *Mendez*.

19 MR. BELLANTONI: And back to *Mendez* with respect to
20 the ripeness, remember, Judge, I just want to be clear that
21 what the Second Circuit discussed in *Mendez* was Judge
22 Vyskocil -- am I saying that right?

23 THE COURT: Yes.

24 MR. BELLANTONI: I say Vyskocil, but was told it's
25 Vyskocil. Denied our preliminary injunction in the first

094RTHOc

1 instance because she found there was no irreparable harm. The
2 case was never dismissed. That judge stayed on the docket from
3 when the Second Circuit rendered its opinion through
4 August/September the same year with a letter from Magistrate
5 Aaron every month to make sure the DOE was still fulfilling its
6 funding obligation.

7 It's not that the Second Circuit dismissed the case
8 because the issues were not ripe, which then goes back to the
9 jurisdictional issue of whether or not you can issue an order,
10 maybe a pendency order for now, and having the DOE start the
11 due course, which was the point of the 90 days in July. Before
12 the letter went to iBRAIN that eviction was possible, we kind
13 of threw that out there. Couldn't ask for three days, seven
14 days; 90 days should be reasonable. The due course, where
15 pendency is to maintain a placement in a twelve-month period,
16 right? So the 90 days, we're already at 60 of those 90 days
17 and still not even a pendency determination.

18 I think perhaps maybe even more important than the
19 funding at this point is at least with a pendency order or a
20 concession that pendency lies at iBRAIN based on the last
21 unappealed final FOFD, which is what existed in *Mendez*, then I
22 would have a much harder time arguing that the payment issues
23 are still ripe. But absent that, there is harm again, and the
24 harm, your Honor, is that without this expedited order. And
25 Judge Failla never said, by the way, that the kids being

094RTHOc

1 removed from the school wouldn't be irreparable.

2 There are cases in the District of Columbia where the
3 D.C. court has held, yes, that's irreparable harm. Every day
4 they're in a school that is not providing with a FAPE or
5 denying a pendency placement, it's a due process violation.
6 And any threat that the student is going to be kicked out on
7 the sidewalk say tomorrow or next week is irreparable harm that
8 doesn't need to actually happen before it's actionable.

9 THE COURT: Okay. It seems to me, Mr. Bellantoni, and
10 maybe this dovetails a little bit with your discussion
11 yesterday with Judge Schofield, although I don't know what that
12 was, I'm hearing a back and forth about how you believe that,
13 for example *Ventura* holds differently than your colleague
14 across the aisle represents that it holds, and sort of
15 back-and-forth about whether this is ripe or not ripe for me to
16 adjudicate. Again, that has been teed up in the motion to
17 dismiss. We haven't had your opposition yet. I am sure you
18 will have a good opposition to that, and I'd get a reply and
19 then I could rule on whether I can provide relief in this case.

20 It seems to me that that is a good precursor to then
21 considering the relief that I can grant, whether it be an order
22 for pendency or something related to the monetary amounts,
23 although I'm not sure on that front. And since your clients
24 are being served in the school, does it not make sense to
25 continue the briefing of this and then revisit this question?

O94RTHOc

1 I brought you in quickly because it was an order to
2 show cause, TRO. I wanted to make sure that nothing was
3 happening. These students were not getting kicked out of the
4 school. We didn't have kids not being served. It sounds like
5 we are not in that situation.

6 I am happy to address, if I needed to, irreparable
7 harm. Although, I will tell you I'm hard pressed to find it
8 given this discussion. And I can talk about an opinion on
9 that, but I am wondering whether it makes more sense to decide
10 the motion to dismiss first and then lead into that, or at
11 least decide the ripeness question and then lead into that.
12 But let me hear your thoughts, Mr. Bellantoni.

13 MR. BELLANTONI: Judge, when the application was made
14 to this Court with the threat of an eviction on the 28th, to
15 me, that was irreparable.

16 THE COURT: I hear you.

17 MR. BELLANTONI: Has that happened? No. Have there
18 been payments? Yes. Can I stand here right now and say that
19 if I don't get an order, the kids are going to be kicked out of
20 the school tomorrow and suffer this irreparable harm? I
21 cannot. I cannot.

22 THE COURT: I appreciate the forthrightness.

23 MR. BELLANTONI: That doesn't mean that the next pay
24 period in two weeks is \$600,000, and they can't cover the
25 payroll and half the kids walk out. I would be back here on

O94RTHOc

1 different facts. I'm not saying that the irreparable harm
2 continues. I'm not saying there wouldn't be any now. I don't
3 have access directly to iBRAIN's books. I don't know how many
4 other payments have been made.

5 By the way, Judge, to complicate this, if they are
6 making payments, the DOE had other matters unrelated to
7 pendency. \$400,000 of tuition based on an FOFD from two years,
8 that then makes the harm less imminent. So I can't say right
9 now that the same harm exists as when I was here two weeks ago,
10 Judge. I just can't.

11 THE COURT: Okay. All right. So it seems to me then
12 that I am going to deny the request for a TRO and preliminary
13 injunction at this point, and I'll give you my reasons for it.
14 And then, we will progress through the regular motion to
15 dismiss.

16 MR. BELLANTONI: May I be seated, your Honor?

17 THE COURT: Pardon?

18 MR. BELLANTONI: May I be seated?

19 THE COURT: Of course. Thank you very much.

20 All right. Let me just then address this. It will
21 take just a few minutes. I've got something written out so
22 I'll go through it right now.

23 Plaintiffs are parents and natural guardians of six
24 student-plaintiffs who each suffer from a brain injury or
25 brain-based disorder that adversely affects their educational

O94RTHOc

1 abilities and performance. And that is in the amended
2 complaint, which is docket No. 4.

3 Plaintiffs now bring a motion for temporary
4 restraining order and/or preliminary injunction "granting each
5 plaintiff a pendency order as an automatic injunction under the
6 Individuals with Disabilities Education Act ('IDEA') against
7 Defendant[s]...and ordering them to directly fund each
8 student's pendency program/placement at their current
9 educational placement including tuition and related services,
10 special transportation, and nursing services where applicable."
11 Dkt. 29, which is the brief that was filed. And we also have a
12 reply brief, as I mentioned, from Mr. Bellantoni at Dkt. 40,
13 that was filed this morning.

14 The defendants are the New York City Department of
15 Education ("DOE") and David Banks, the Chancellor of the DOE.
16 defendants oppose plaintiffs' motion for injunctive relief, and
17 also argue that the amended complaint should be dismissed at
18 Dkt. 38, which I'll call the opposition.

19 Plaintiffs have not yet had an opportunity to oppose
20 defendants' motion to dismiss. And, therefore, I am not
21 addressing the topics in the motion to dismiss here today. But
22 instead, I am addressing the request for preliminary injunctive
23 relief on a TRO, order to show cause, that was filed by the
24 plaintiff, and as I mentioned, I will deny that motion.

25 I am going to read my reasoning, but I would ask the

O94RTHOc

1 parties, if they would agree, that instead of reading the full
2 citations, if I could just say "citation included" and provide
3 those citations to the court reporter so that you don't have to
4 sit there while I read 5 F.3rd, et cetera.

5 Would that be okay with you, Mr. Bellantoni?

6 MR. BELLANTONI: Yes, your Honor.

7 THE COURT: And with you, Mr. Lindeman?

8 MR. LINDEMAN: Yes, your Honor.

9 THE COURT: Okay. The transcript will read fine. It
10 will save us all me speaking it.

11 Under the IDEA, states receiving federal special
12 education funding are required to provide a free appropriate
13 public education, or FAPE, to children with disabilities. 20
14 U.S.C. § 1400(d)(1)(A); see *T.M. ex rel. A.M. v. Cornwall Cent.*
15 *Sch. Dist.*, 752 F.3d 145, 151 (2d Cir. 2014).

16 To provide a FAPE to each student with a disability, a
17 school district must develop an individualized education
18 program ("IEP") that is "reasonably calculated to enable the
19 child to receive educational benefits." *Ventura de Paulino v.*
20 *N.Y.C. Dept of Educ.*, 959 F.3d 519, 525 (2d Cir. 2020) (quoting
21 *T.M.*, 752 F.3d at 151).

22 "The IDEA also requires states to provide an
23 administrative procedure for parents to challenge the adequacy
24 of their children's IEPs." *Mendez v. Banks*, 65 F.4th 56, 59
25 (2d Cir. 2023) (citing 20 U.S.C. § 1415(b)(6)).

094RTHOc

1 New York has implemented a two-tier system of
2 administrative review. N.Y. Educ. Law § 4404; see *Ventura de*
3 *Paulino*, 959 F.3d at 526. In the first tier, a parent can file
4 an administrative due process complaint challenging the IEP and
5 requesting a hearing before an impartial hearing officer or an
6 IHO. *Ventura de Paulino*, 959 F.3d at 526.

7 In the second tier, parties aggrieved by the IHO's
8 decision can appeal the case to a state review officer or an
9 SRO. *Id.*; see *R.E. v. N.Y.C. Dept of Educ.*, 694 F.3d 167, 175
10 (2d Cir. 2012). "Once the state review officer makes a final
11 decision, the aggrieved party may seek judicial review of that
12 decision in a state or federal trial court." *Ventura de*
13 *Paulino*, 959 F.3d at 526.

14 Section 1415(j) of the IDEA, known as the "stay-put"
15 or "pendency" provision, provides that "while the
16 administrative and judicial proceedings are pending and unless
17 the school district and the parents agree otherwise, a child
18 must remain, at public expense, in his or her then-current
19 educational placement." *Id.*

20 "The purpose of this provision is 'to maintain the
21 [child's] educational status quo while the parties' dispute is
22 being resolved." *Abrams v. Porter*, No. 20-3899, 2021 WL
23 5829762, at *1 (2d Cir. Dec. 9, 2021) (summary order) (quoting
24 *T.M.*, 752 F.3d at 152). "[A] school district is required 'to
25 continue funding whatever educational placement was last agreed

O94RTHOc

1 upon for the child until the relevant administrative and
2 judicial proceedings are complete.'" *Doe v. E. Lyme Bd. of*
3 *Educ.*, 962 F.3d 649, 659 (2d Cir. 2020) (quoting *T.M.*, 752 F.3d
4 at 171).

5 The stay-put provision, however, "does not guarantee a
6 disabled child the right to remain in the exact same school
7 with the exact same service providers while his administrative
8 and judicial proceedings are pending. Instead, it guarantees
9 only the same general level and type of services that the
10 disabled child was receiving." *T.M.*, 752 F.3d at 171.

11 Although parents "dissatisfied with their child's
12 education can unilaterally change their child's placement
13 during the pendency of review proceedings," *Ventura de Paulino*,
14 959 F.3d at 526. (Quotation marks and citation omitted). They
15 cannot unilaterally require the school district to pay for that
16 new school, see *id.* at 533 (DOE was not obligated to fund
17 students' placements where parents unilaterally enrolled
18 students in new schools without the DOE's approval). Unless
19 the parents can "persuade the school district to pay for the
20 program's new services on a pendency basis," their only
21 recourse is to "enroll the child in a new school, and then seek
22 retroactive reimbursement from the school district after the
23 IEP dispute is resolved." *Id.* at 534.

24 "Although the IDEA's stay-put provision generally does
25 not require the state to pay the costs of a new educational

094RTHOc

1 placement during the pendency of proceedings, parents can
2 obtain funding for a new placement if an IHO or SRO finds it to
3 be appropriate and issues a pendency order and the school
4 district does not appeal the decision." *Mendez*, 65 F.4th at
5 59. For children with a pendency order, "the IDEA's stay-put
6 provision does not create an entitlement to immediate payment
7 or reimbursement," but "[p]arents or guardians may still be
8 able to obtain such relief if they establish that a delay or
9 failure to pay has jeopardized their child's educational
10 placement." *Id.* at 63.

11 The Court generally assumes familiarity with the facts
12 and background of this case, and recounts now only the key
13 details to the disposition of the present expedited motion.
14 There are six student-plaintiffs in this case. Each filed a
15 due process complaint against the DOE on or around July 2,
16 2024. Am. Compl. ¶ 10.

17 Each student-plaintiff seeks pendency placement at the
18 International Academy of the Brain ("iBRAIN") for the 2024-2025
19 school year. *Id.* ¶ 21. The six Student-Plaintiffs here fall
20 into two categories. And I am updating this from what is set
21 forth in the present docket based on information related to me
22 here today. First, for three students S.J.D. and M.B. and
23 A.C., have already received pendency orders in connection with
24 the 2024-2025 school year. See Dkts. 39-1 and 39-2 and the
25 representations made here at this hearing. And the Department

O94RTHOc

of Education does not plan to appeal those pendency orders.

Second, three students, A.T., L.C., and M.C., have invoked pendency but have not yet received a pendency order in the administrative level. Their hearings have taken place either today, will take place tomorrow, or took place in late August based on what has been represented here today in Court.

Plaintiffs seek a temporary restraining order and/or a preliminary injunction "[d]eclaring iBRAIN to be each student's pendency program/placement...for the 2024-2025 extended school year, which includes each Student's related services" and "[d]irecting DOE to expeditiously fund each student-plaintiff's tuition and related services." Br. at 25. They seek this on an expedited basis.

The Court first addresses the applicable legal standard. As a threshold matter, in the Second Circuit, the standard for obtaining a temporary restraining order is the same as for obtaining a preliminary injunction. See, e.g., *Empire Trust, LLC v. Cellura*, No. 24-cv-00859 (KMK), 2024 WL 1216729, at *2 (S.D.N.Y. Mar. 21, 2024); *Free Country Ltd. v. Drennen*, 235 F. Supp. 3d 559, 565 (S.D.N.Y. 2016).

The Court thus analyzes the plaintiffs' request for a temporary restraining order and for a preliminary injunction together. Traditionally, a party seeking preliminary injunctive relief "must demonstrate: (1) a likelihood of success on the merits or sufficiently serious questions going

094RTHOc

1 to the merits to make them a fair ground for litigation and a
2 balance of hardships tipping decidedly in the plaintiff's
3 favor; (2) a likelihood of irreparable injury in the absence of
4 an injunction; (3) that the balance of hardships tips in the
5 plaintiff's favor; and (4) that the public interest would not
6 be disserved by the issuance of an injunction." *Benihana, Inc.*
7 *v. Benihana of Tokyo*, 784 F.3d 887, 895 (2d Cir. 2015)
8 (quotation marks, citation, and ellipses omitted).

9 Preliminary injunctive relief "is an extraordinary and
10 drastic remedy, one that should not be granted unless the
11 movant, by a clear showing, carries the burden of persuasion."
12 *Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506, 510
13 (2d Cir. 2005) (internal quotation marks and citation omitted).

14 Both parties assert that standards other than the
15 traditional standard applies here. Plaintiff argues that
16 because they ask the Court to "assess[] pendency claims under
17 20 U.S.C. § 1415(j)," "[t]he traditional preliminary injunction
18 standard does not apply." Br. at 22. They instead assert that
19 they are entitled to an "automatic pendency injunction" and
20 that the Court should not consider the factors of irreparable
21 harm and either a likelihood of success on the merits or a fair
22 ground for litigation and a balance of the hardships in
23 analyzing their request for relief. Id. at 12-13.

24 Plaintiffs are correct that the Second Circuit has
25 characterized Section 1415(j) of the IDEA as "an automatic

094RTHOc

1 injunction designed to maintain the child's educational status
2 quo while the parties' IEP dispute is being resolved." *Ventura*
3 *de Paulino*, 959 F.3d at 529; *Zvi D. v. Ambach*, 694 F.2d 904,
4 906 (2d Cir. 1982) (Section 1415(j) "is, in effect, an
5 automatic preliminary injunction" which "substitutes an
6 absolute rule in favor of the status quo for the court's
7 discretionary consideration of the factors of irreparable harm
8 and either a likelihood of success on the merits or a fair
9 ground for litigation and a balance of hardships.")

10 However, plaintiffs are wrong as a matter of law as to
11 the applicable legal standard for this case. "The automatic
12 injunctive effect of Section 1415(j) is a student's ability to
13 automatically remain in their current educational placement
14 during the pendency of their underlying [administrative]
15 proceedings." *Grullon v. Banks*, No. 23-cv-05797 (JGLC), 2023
16 WL 6929542, at *5 (S.D.N.Y. Oct. 19, 2023). "It is not, as
17 plaintiffs suggest, a mechanism through which plaintiffs can
18 seek a court order requiring DOE to acknowledge a pendency
19 determination." *Id.*; see *Mendez*, 65 F.4th at 62-63 (Plaintiffs
20 were "wrong as a matter of law" when they argued that "there is
21 no requirement to show irreparable harm in order to obtain an
22 order requiring the DOE to immediately fund the educational
23 placements for the 2022-2023 school year" (emphasis omitted)).

24 Defendants assert that a heightened standard for
25 obtaining a preliminary injunction should apply, because

094RTHOc

1 plaintiffs seek a purportedly "mandatory" injunction. Opp. at
2 11. Defendants therefore argue that plaintiffs "must show a
3 clear or substantial likelihood of success on the merits, and
4 make a strong showing of irreparable harm, in addition to
5 showing that the preliminary injunction is in the public
6 interest." Id. (quotation marks and citation omitted).

7 However, it seems to the Court that defendants are
8 incorrect that the "heightened" preliminary injunction standard
9 for mandatory injunctions should apply here. The Second
10 Circuit has explained that a "mandatory" preliminary injunction
11 is one that "alters the status quo by commanding some positive
12 act, as opposed to a prohibitory injunction seeking only to
13 maintain the status quo." *Cacchillo v. Insmmed, Inc.*, 638 F.3d
14 401, 406 (2d Cir. 2011).

15 As the Court understands it, plaintiffs seek pendency
16 orders to maintain the status quo, as opposed to commanding
17 some positive act from defendants in this case. See Br. at 3
18 (Each parent-plaintiff intends "to maintain their students
19 placement at iBRAIN for the...2024-2025 school year").

20 To the extent Plaintiffs seek any positive act, it is
21 their request that their pendency placements be funded
22 expeditiously, which, in this context, would also serve to
23 maintain the status quo because it would allow plaintiffs to
24 remain in their present placements. Moreover, defendants have
25 not directed the Court to any cases, nor has the Court

094RTHOc

1 independently located any cases, where a plaintiff seeking a
2 pendency order and related funding under Section 1415(j) was
3 subjected to a heightened "mandatory" injunction standard. Cf.
4 *Mendez*, 65 F.4th at 62-64, where the Court applied traditional
5 preliminary injunction standard, rather than heightened
6 "mandatory" preliminary injunction standard, to claims for
7 funding during pendency under the IDEA); *Landsman v. Banks*, No.
8 23-cv-06404 (PAC), 2023 WL 4867399, at *1-2 (S.D.N.Y. July 31,
9 2023) (applying heightened mandatory preliminary injunction
10 standard where plaintiff sought pendency order for placement
11 that differed from determination from administrative
12 proceedings); *M.W. v. N.Y.C. Dep't of Educ.*, No. 15-cv-05029,
13 2015 WL 5025368, at *3 (S.D.N.Y. Aug. 25, 2015) (applying
14 heightened mandatory preliminary injunction standard where
15 plaintiff sought temporary, prospective equitable relief in the
16 form of "compensatory education," rather than relief designed
17 to maintain the status quo).

18 However, the Court need not decide at all whether the
19 heightened "mandatory" injunction standard or the traditional
20 preliminary injunction standard applies here, and the Court
21 does not do so because defendants prevail even applying the
22 traditional standard for a preliminary injunction.

23 The Court now proceeds to analyze the traditional
24 preliminary injunction factors, and we'll start with
25 irreparable harm. The Court concludes that the plaintiffs have

O94RTHOc

1 not met their burden there.

2 "Irreparable harm is the single most important
3 prerequisite for the issuance of a preliminary injunction."
4 *Sterling v. Deutsche Bank Nat'l Tr. Co. as Trustees for Femit*
5 *Tr.* 2006–FF6, 368 F. Supp. 3d 723, 727 (S.D.N.Y. 2019). "To
6 show irreparable harm, the movant must demonstrate an injury
7 that is neither remote nor speculative, but actual and imminent
8 and that cannot be remedied by an award of monetary damages."
9 *Oliver v. N.Y. State Police*, 812 F. App'x 61, 62 (2d Cir. 2020)
10 (summary order) (citation omitted).

11 Plaintiffs request an order that iBRAIN is their
12 pendency program or placement and directed the DOE to
13 expeditiously fund their pendency program or placement.
14 However, they have failed to show a likelihood of irreparable
15 harm in the absence of such an order. As to the three
16 plaintiffs, they have already received pendency orders
17 establishing iBRAIN as their pendency regarding their program,
18 and plaintiffs have provided no evidence to the Court that the
19 DOE is contesting that pendency determination and the DOE has
20 confirmed that here.

21 As to the other student-plaintiffs, the evidence
22 before the Court shows that they are continuing through the
23 administrative process in the normal course to obtain pendency
24 orders through the administrative process. In fact, those
25 hearings are taking place either now, have taken place

O94RTHOc

1 recently, or are taking place as late as tomorrow.

2 Plaintiffs have provided no evidence to the Court that
3 while that administrative process continues, the DOE has taken
4 any action to contest those student-plaintiffs' placements
5 while those proceedings continue.

6 As to plaintiffs' request for expeditious funding to
7 accompany their pendency placements, as plaintiffs acknowledge
8 in their brief, the Second Circuit has explained that Section
9 1415(j) "does not create a procedural right to immediate
10 payment, at least not absent a showing that a child's placement
11 will be put at risk." *Mendez*, 65 F.4th at 64.

12 Despite plaintiffs' assertions in their brief that
13 "the students" educational placements are at risk," Br. 18
14 (further capitalization and emphasis omitted), based on the
15 evidence before the Court and the discussion here during this
16 oral argument and preliminary injunction hearing, the Court
17 does not conclude that the student-plaintiffs' placements are
18 at risk without expedited funding at this time.

19 Much of the materials provided by plaintiffs in
20 support of their motion are not related to the plaintiffs
21 before the Court, but rather, seem to relate to other students
22 at iBRAIN. For example, in the Declaration of Arthur Mielnik,
23 Dkt. 31, the Director of Strategic Planning for iBRAIN declared
24 that "another...iBRAIN student, L.M.," has not received
25 payments towards tuition or transportation services despite

094RTHOc

1 receiving a pendency order on August 2, 2024, id. at ¶¶ 1,
2 13-16. But L.M. is not a party to this lawsuit, so this
3 information is not relevant.

4 The only possible evidence that the
5 student-plaintiffs' placements are at risk is a letter
6 addressed to iBRAIN from El-Kam Realty Co., stating that iBRAIN
7 is "indebted...in the total sum of \$146,511.13 in rent and
8 additional rent...which you are required to pay, on or before
9 August 28, 2024." Dkt. 31-5 at 2. The letter notes that if
10 iBRAIN fails to make the payment or surrender the premises, the
11 landlord "will commence summary proceedings or an appropriate
12 action." Id.

13 Per the declaration of Arthur Mielnik, this letter
14 relates to iBRAIN's Manhattan Upper East Side administration
15 office. Dkt. 31 at ¶ 27. Arthur Mielnik also declared that
16 iBRAIN "is over \$1,000,000 behind in rent payments across both
17 its Upper East Side, Manhattan, and Sunset Park, Brooklyn,
18 locations" and "will not be able to fully cover its payroll
19 obligations as of September 1, 2024." Id. at ¶ 28-29.

20 However, there are some additional new facts that have
21 come to light here at the hearing as well. For example, S.J.D.
22 has now been paid in terms of a tuition payment, which would
23 affect the financial viability of the school. In addition, it
24 may be the case that iBRAIN is experiencing financial distress,
25 but this financial distress seems to be due to factors other

094RTHOc

1 than the timing of the pendency payments for the
2 student-plaintiffs here. As just stated, S.J.D. already has a
3 tuition payment that has gone in.

4 Accordingly the commercial rent demand provided by
5 plaintiffs, at Dkt. 31-5, and the outstanding rent charges are
6 for rent payments for the iBRAIN's administrative office
7 building due from April 2024 through August 2024. Dkt. 31-5 at
8 4. But the student-plaintiffs here filed their due process
9 complaints only on July 2, 2024, see Dkts. 4-1 through 4-6
10 (student-plaintiff's due process complaints), and the
11 administrative process has been proceeding since that time.

12 It is unclear to the Court why iBRAIN's financial
13 distress and failure to make rent payments for its
14 administrative office building, which began well before the
15 student-plaintiffs even sought pendency placements at iBRAIN,
16 should be resolved by the Court ordering expedited payments for
17 these student-plaintiffs' placements for the 2024-2025 school
18 year. Additionally, plaintiffs have not made clear to the
19 Court that the pendency payments sought now could even resolve
20 iBRAIN's purported financial difficulties.

21 In addition, at this hearing today, it has been
22 represented that the students will not be disenrolled from the
23 school, so they will continue to have their services provided
24 to them, and that the payments have been made such that there
25 hasn't been an additional proceeding brought with respect to

094RTHOc

1 rent or anything regarding the school.

2 So put simply here, there's no evidence before the
3 Court that there is an "imminent threat to the educational
4 services themselves" for the student-plaintiffs at this time.
5 *Abrams v. Carranza*, No. 20-cv-05085 (JPO), 2020 WL 6048785, at
6 *2 (S.D.N.Y. Oct. 13, 2020); see *id.* at *1-2 (although other
7 iBRAIN plaintiffs asserted that they faced eviction for unpaid
8 rent, Court did not find that students were actually imminently
9 in danger of losing their placements) *Mendez*, 65 F.4th at 54
10 (the IDEA "does not create a procedural right to immediate
11 payment, at least not absent a showing that a child's placement
12 will be put at risk"). By all accounts, all student-plaintiffs
13 before the Court are continuing in their placements at iBRAIN
14 without disruption.

15 I will also note that in the reply brief filed this
16 morning, although again, although plaintiffs state that "there
17 is imminent risk to the students' educational placements,"
18 reply at 7 (further capitalization and emphasis omitted), they
19 make no mention of any specific facts that would establish such
20 risk and don't even mention the potential risk of eviction and
21 school closure. That is in fact consistent with what has been
22 presented to me during this proceeding. Given this, the Court
23 is left to conclude that there is no actual and imminent risk
24 that any student-plaintiff will lose their placement at this
25 time, and therefore, there's a failure to demonstrate

094RTHOc

1 irreparable harm (let alone a strong showing required for a
2 mandatory injunction) absent an injunction. The Court need not
3 address the remaining elements of a preliminary injunction if a
4 plaintiff has failed to show irreparable harm. See *Coscarelli*
5 *v. ESquared Hosp. LLC*, 364 F. Supp. 3d 207, 221 (S.D.N.Y.
6 2019); *Lewis v. Government of England and United Kingdom*, No.
7 22-cv-10792 (JLR), 2023 WL 2664081, at *2 n.1 (S.D.N.Y. Mar.
8 28, 2023)

9 I will note, though, that there are serious concerns
10 that the Court has as to whether plaintiff does have a
11 likelihood of success on the merits, given the issues that were
12 raised by defendants in the motion to dismiss. And so, I won't
13 reach those right now until I have the full briefing on that.
14 But because there's no risk of irreparable harm, I'm going to
15 deny the expedited preliminary injunction/TRO that's sought
16 here, and the case will proceed on to address the motion to
17 dismiss.

18 All right. Is there anything further, Mr. Bellantoni,
19 that we should discuss here today?

20 MR. BELLANTONI: Other than the briefing schedule,
21 your Honor, no.

22 THE COURT: Okay. And Mr. Lindeman, anything further?

23 MR. LINDEMAN: Nothing further from defendants, your
24 Honor.

25 THE COURT: Okay. So I have defendants' motion to

O94RTHOc

1 dismiss. Do we not have a briefing schedule for that motion?

2 MR. LINDEMAN: I don't believe we do, your Honor.

3 THE COURT: That's fine. It looks like it was filed
4 on August 29.

5 MR. LINDEMAN: That's correct, your Honor.

6 THE COURT: So what would you like, Mr. Bellantoni?

7 MR. BELLANTONI: Your Honor, I'm trying to compute the
8 dates from now, but can we have four weeks from the 29th so
9 three weeks from this week?

10 THE COURT: Sure. Sure. How about September 26?

11 MR. BELLANTONI: That's fine, your Honor. Thank you.

12 THE COURT: Okay. And then Mr. Lindeman, when would
13 you like your reply?

14 MR. LINDEMAN: Two weeks after September 26 is
15 October 10.

16 THE COURT: October 10, yes.

17 MR. LINDEMAN: The only other request I would make,
18 your Honor, and I don't know if this is necessary or not, but
19 given the similarity in the cases in the two matters in front
20 of Judge Schofield, Mr. Bellantoni had indicated to the Court
21 that he may seek to amend parts of his complaint. There are
22 some elements that at least I think the parties agree are moot
23 or would have to change to survive.

24 We set in that case a deadline of next Friday, I
25 believe, as the deadline to decide if an amendment was coming

O94RTHOc

1 in. I don't know if that's necessary here or not.

2 THE COURT: Let's talk about that. Mr. Bellantoni,
3 what is your view on an amendment here?

4 MR. BELLANTONI: Your Honor, an amendment might make
5 sense. If I'm going to amend it and the matter is moot as to
6 the three plaintiffs that we discussed today, it may simplify
7 matters. I mean, the need for the motion practice or different
8 motion practice. If we're going to do that, I'd ask for two
9 weeks. I asked for Friday the 13th and Judge Schofield made
10 it Thursday the 12th. So maybe a week from the 12th, the 19th
11 to amend, or if not, reply by the 26th to oppose the motion.
12 I'm sorry.

13 THE COURT: Let's get that clear. I'm sorry. You are
14 going to amend by September 19. If you chose not to amend,
15 you'll put in your opposition by September 26 with a reply on
16 October 10; is that correct?

17 MR. BELLANTONI: Yes, your Honor.

18 THE COURT: All right. If you do choose to amend on
19 September 19, I'm going to then moot out the earlier motion to
20 dismiss, and you will then move with respect to the
21 September 19. Do you want to set down a briefing schedule for
22 that in the alternative?

23 MR. LINDEMAN: I think a briefing schedule, the
24 necessity of that, would have to be determined by the scope of
25 the amendment, your Honor.

O94RTHOc

1 THE COURT: Sure. I mean, if I don't set down a
2 schedule, then you would file it within 30 days.

3 MR. LINDEMAN: Yes, 21 days.

4 THE COURT: Or however many days you normally -- 21
5 days; is that it? And then, I think, Mr. Bellantoni gets
6 whatever period he gets under the rules. So would you like to
7 go with the default rules or would you like to set a schedule?

8 MR. LINDEMAN: I would be happy to have 30 days
9 instead of 21. Certainly the additional time would be helpful,
10 but I just don't want this to sit on the Court's docket too
11 long.

12 THE COURT: I don't either. Mr. Bellantoni, what is
13 your position on the motion to dismiss? I don't know if there
14 will be one, but it is what it is.

15 MR. BELLANTONI: Your Honor, if I amend by the 19th,
16 if we could have -- give Mr. Lindeman 30 days to answer and/or
17 move.

18 THE COURT: Sure.

19 MR. BELLANTONI: And then, we could submit maybe a
20 status report two days before. So we would let your Honor know
21 either the motion is coming or God forbid there's a request for
22 an extension, but at least it's not made on the 30th day.

23 THE COURT: I'm not sure we need that. Why don't we
24 just say September 19 is the deadline to amend, and then I'll
25 set down October 7 as the DOE's deadline to answer and/or move

O94RTHOc

1 to dismiss, either one.

2 If they answer, we're going forward. If they should
3 move to dismiss and they have done that by October 16, when
4 would you like to oppose any motion, Mr. Bellantoni?

5 MR. BELLANTONI: Thirty days, your Honor?

6 THE COURT: Yes. That would be November 14 for the
7 opposition. And the reply, Mr. Lindeman?

8 MR. LINDEMAN: Well, November 28 is Thanksgiving, your
9 Honor.

10 THE COURT: Let's not do that. That's in no one's
11 interest.

12 MR. LINDEMAN: So if you have the Tuesday of the week
13 after maybe?

14 THE COURT: Sure. That would be December 3.

15 MR. LINDEMAN: Yes.

16 THE COURT: Okay. So I have two briefing schedules.
17 I'll actually put those down in an order so that we're
18 perfectly clear and have them clear. But essentially, it's a
19 briefing schedule that will flow from an amended complaint that
20 comes September 19 should the DOE decide to file a motion to
21 dismiss, or a briefing schedule to the current motion to
22 dismiss on the current complaint that is on file.

23 Okay. Mr. Bellantoni, anything further?

24 MR. BELLANTONI: No, your Honor.

25 THE COURT: Okay. Mr. Lindeman, anything further?

094RTHOc

1 MR. LINDEMAN: No. Thank you, your Honor.

2 THE COURT: Great. Thank you very much and court is
3 adjourned in this case. Take care.

4 (Adjourned)

5 o0o

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25